SUPREME COURT, U.S.
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No. 93-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Memorandum

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ARGUMENT

1. Respondents ask this Court to disbelieve the Ninth Circuit's assertion in this case that "there is no 'plain error' exception in civil cases in this circuit." Opp. at 11, quoting Pet. App. at 2a, quoting *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.) (en banc) (plurality), *cert. denied*, ___U.S.___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991). Respondents call the Ninth Circuit's statement "misleading," and cite four cases for the proposition that the "Ninth Circuit has and does depart from Rule 51 when necessary to prevent a miscarriage of justice." Opp. at 11.

Respondents misstate those four holdings of the Ninth Circuit, which do not recognize a plain error exception when a party has failed to object to flawed jury instructions. In *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir. 1991), for example,

the defendant objected to the instruction at issue but the trial court refused to consider the objection.

Hammer v. Gross, *supra*, and *Glover v. BIC Corp.*, 987 F.2d 1410, 1418-20 (9th Cir. 1993), recognized that an objection has been preserved when "the trial court is aware of the party's concerns with an instruction and further objection would be unavailing." 932 F.2d at 847. In other words, if counsel effectively objected to the instruction the Ninth Circuit will not require further objection. That is hardly a plain error exception to Rule 51 for cases, like this one, where a party has raised no objection at all. *Compare McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102-03 (3d Cir. 1960) (reversing for plain error in jury instruction despite counsel's abject failure to object); *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4th Cir.) (same), *cert. denied*, 474 U.S. 846 (1985); *Pate v. Seaboard R.R., 819 F.2d 1074, 1082-83 (11th Cir. 1987) (same; distinguishing case from separate exception to Rule 51 in situations where "further objection would have been unavailing").*

Finally, *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 2887 (1991), expressed agreement with a substantive holding of the Second Circuit that a specific instruction constituted "plain error." But the Ninth Circuit panel immediately noted in a footnote that the plaintiff in the case before it had "properly objected" to the disputed instruction. *Id.*, at 330 n.4.

2. Respondents assert that "the jury was fully and correctly instructed on every essential element of respondent's First Amendment retaliation claim." Opp. at 12. That is not true. The jury instructions focused on respondent's unsuccessful claim that they were wrongfully evicted from the campground. Pet. App. 39a-40a; Opp. at 1a-8a. The trial court did not explain whether the jury had to determine if Ranger Sereno's report of Nievara's assault was false, or how to determine if the report was "wrongful," or what standard of causation applied. Indeed,

the instructions mentioned the First Amendment claim only once, and then only to explain how the jurors were to fill out the special verdict form. Opp. at 7a-8a.

3. Respondents argue that this Court need not address whether the proximate cause standard should apply to actions under 42 U.S.C. § 1983, because proximate cause "has long been an essential element of a § 1983 claim." Opp. at 19. To support this erroneous proposition, respondents misread this Court's precedents. Respondents cite a passage of *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that dealt with the question of intent, not proximate cause. Respondents also point to a passage in *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986), which concerned the measure of damages for a § 1983 claim, not causation. Finally, *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), formulated a test of causation for cases involving mixed motives, but did not address the causation requirement when there is an independent intervening decisionmaker. *Mt. Healthy* is consistent with our position here, in contrast to a footnote in *Malley v. Briggs*, 475 U.S. 335, 344, n.7 (1986), which suggested in dicta that the presence of an independent decisionmaker would not break the causal chain. Accordingly, this Court should address the application of proximate cause to this case.[1]

[1] Although respondents dispute the application here of *Grove Sch. v. Guardianship and Advocacy Comm'n*, 596 F. Supp 1361 (N.D. Ill. 1984) to this case, its causation analysis under § 1983 remains directly relevant.

For all of the reasons stated in our Petition and this Reply, the writ of certiorari should be granted.

Respectfully submitted,

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